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11 UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF WASHINGTON
13

14 JEREMY OLSEN,

15 Plaintiff,

16 v.

17 XAVIER BECERRA, in his official
18 capacity as Secretary of the United States
19 Department of Health and Human
20 Services,

21 Defendant.

No. 2:21-CV-00326-SMJ

SUR-REPLY IN OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION

22 Defendant Xavier Becerra, in his official capacity as Secretary of the United
23 States Department of Health and Human Services, (“Defendant”), through counsel,
24 submits the following sur-reply in opposition to Plaintiff’s motion for preliminary
25 injunction. This sur-reply is supported by the Declaration of Pamela Durbin (“Durbin
26 Decl.”), and the Declaration of John T. Drake (“Drake Decl.”), filed herewith.
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I. SUR-REPLY ARGUMENT

There are two claims for Medicare reimbursement at issue in this case. The first is for reimbursement of a 90-day supply of continuous glucose monitor (“CGM”) sensors that Plaintiff’s supplier, MiniMed Distribution Corp. (“MiniMed”) furnished to Plaintiff on April 19, 2019 (the “**April 2019 claim**”). Pl.’s Compl., ECF No. 1 at ¶¶ 63-66. The second is for a 90-day supply of CGM sensors that MiniMed furnished to Plaintiff on March 10, 2021 (the “**March 2021 claim**”). Pl.’s Compl., ECF No. 1 at ¶¶ 67-90.

Plaintiff contends in his reply brief that both claims were “rejected” by the Secretary on “grounds that this Court has already found constitute ‘bad faith.’” ECF No. 22 at 1, 2, 8, 10. Respectfully, that is not accurate.

The April 2019 and March 2021 claims were submitted to and denied by the Secretary’s Medicare Administrative Contractor, Noridian Healthcare Solutions (“Noridian”) before this Court’s bad faith ruling in *Olsen I*, which was entered on April 20, 2021. *See Olsen v. Becerra*, Case No. 20-CV-0374-SMJ, ECF No. 50 (order awarding market-rate attorney’s fees based upon finding that the Secretary acted in bad faith). After the Court’s April 20, 2021 bad faith ruling, the Centers for Medicare & Medicaid Services (“CMS”) directed Noridian to pay the reimbursement claim at issue in *Olsen I*, and to implement a system to ensure that Plaintiff’s future CGM-related claims would be paid going forward. Durbin Decl. at ¶ 3 & Exhibit A, page 2 of 23. That direction was issued to Noridian on July 13, 2021. Durbin Decl. at ¶ 3 &

1 Exhibit A, page 2 of 23.

2 Noridian paid the claim at issue in *Olsen I*—as well as the April 2019 and
3 March 2021 claims at issue in this case—two days later, on July 15, 2021.¹ Durbin
4 Decl. at ¶ 4 & Exhibit B, page 2 of 5. The April 2019 claim was paid under claim
5 number 19112897095001; the March 2021 claim was paid under claim number
6 21076836253001. Durbin Decl. at ¶ 4 & Exhibit B, page 2 of 5. These claim
7 numbers were “replacement” claim numbers created by Noridian to replace the
8 original (denied) claim numbers for the April 2019 claim (19112897095000), and
9 March 2021 claim (21076836253000).

10 In short, the April 2019 and March 2021 claims were not “rejected” by the
11 Secretary; they were paid. Nor were these claims rejected in defiance of this Court’s
12 bad faith ruling in *Olsen I*; the original denials (which the Secretary subsequently
13 reversed) occurred before the bad faith ruling was issued. Plaintiff’s assertions to the
14 contrary appear to be grounded in his mistaken belief that these claims had *not* been
15 paid (or, potentially, in his mistaken supposition that the claims were paid much later,
16 and only after the Secretary realized that he intended to file this lawsuit).

17 To be clear, Defendant does not presently have any reason to believe that
18 Plaintiff knew that the April 2019 and March 2021 claims had been paid on July 15,
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26 ¹ Noridian also paid 8 other CGM-related claims that had been denied prior to the
27 April 20, 2021 bad faith ruling on the same day. Durbin Decl. at ¶ 4 & Exhibit B.
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1 2021, at the time this lawsuit was filed. It is entirely possible that the entity to which
2 the payments were issued—Plaintiff’s supplier, MiniMed—never told Plaintiff that it
3 had received payment from Noridian.² Nonetheless, the fact that CMS facilitated
4 payment of these claims shortly after this Court’s bad faith ruling in *Olsen I* renders
5 Plaintiff’s allegations of continued bad faith entirely unsupported.
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7 Plaintiff also contends in his reply brief that the Secretary has rejected *other*
8 claims that are not at issue in this case, but which he is currently appealing through the
9 administrative appeal process, including a claim for reimbursement of a 90-day supply
10 of sensors furnished to Plaintiff on October 13, 2021 (the “October 2021 claim”).
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12 ECF No. 22 at 2, 4, 7, 10 & Exhibit A. That, too, is inaccurate.
13

14 Noridian originally denied the October 2021 claim by mistake, due to an
15 employee’s failure to re-code the claim pursuant to the instructions issued by CMS on
16 July 13, 2021. Durbin Decl. at ¶ 4 & Exhibit B, pages 3-4 of 5. But Noridian
17 subsequently corrected its error, and paid the October 2021 claim on December 27,
18 2021. Durbin Decl. at ¶ 4 & Exhibit B, pages 2, 3-4 of 5. The October 2021 claim
19 was paid under claim number 21288839976002. Durbin Decl. at ¶ 4 & Exhibit B,
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23 ² Undersigned counsel informed counsel for Plaintiff in late February that the April
24 2019 and March 2021 claims had been paid by Noridian in July 2021. *See* Drake
25 Decl., Exhibit A (email dated February 25, 2022) and Exhibit B (email dated
26 February 28, 2022).
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1 page 2 of 5. This was a “replacement” claim number created by Noridian to replace
2 the original (erroneously denied) claim number for this claim (21288839976001).

3 Here again, Plaintiff’s allegations regarding the October 2021 claim appear to
4 be grounded in a mistaken belief that this claim had *not* been paid. The fact that this
5 claim was originally denied in error by a contractor, while admittedly unacceptable,
6 does not amount to continued bad faith by the Secretary. Nor does it warrant the
7 issuance of Plaintiff’s requested preliminary injunction.
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10 II. CONCLUSION

11 The reimbursement claims at issue in this case were paid by the Secretary
12 shortly after this Court’s bad faith ruling in *Olsen I*. Another claim, which is not at
13 issue, was originally denied in error by a contractor. But that error has been corrected,
14 and the claim has been paid. Plaintiff’s allegations of continued bad faith are factually
15 unsupported, and do not warrant issuance of the requested preliminary injunction.
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17 The Court should deny the motion.
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19 DATED this 12th day of March, 2022.

20
21 Vanessa R. Waldref
22 United States Attorney

23 s/John T. Drake
24 Brian M. Donovan
25 John T. Drake
26 Assistant United States Attorneys
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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2022, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

NAME & ADDRESS	Method of Delivery
Roger Townsend BRESKIN JOHNSON TOWNSEND 1000 Second Ave., Suite 3670 Seattle, WA 98104	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____
James Pistorino PARRISH LAW OFFICES 788 Washington Road Pittsburgh, PA 15228	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____

s/John T. Drake

John T. Drake